IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

THURSDAY, THE 18TH OCTOBER 2007 / 26TH ASWINA 1929

FAO.No. 293 of 2006()

AGAINST THE ORDER DATED 16/10/2006 IN IA.1375 & 1244/2006 IN OS.116/2006 of PRL. SUB COURT, KOCHI.

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APPELLANT/RESPONDENTS/PLAINTIFFS

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1. MR.FRANCIS, AGED 79 YEARS,
   S/O.JOSEPH, KADUNGAMPARAMBIL HOUSE,
   CHERIYAKADAVU, KANNAMALLY P.O.,
   NOW RESIDING AT KANNAMALLY P.O., KOCHI-682 008.

2. MR.GEORGE, AGED 73 YEARS,
   S/O.JOSEPH, KAITHAVELIKAKATHU HOUSE,
   MUNDANVELI P.O., KOCHI-682 507.

3. MR.BONEY JOSEPH, AGED 52 YEARS,
   S/O.JOHN JOSEPH, NERAKKASSERIYIL HOUSE,
   MANASSERY KETTIPARAMBU, P.O.KANNAMALLY,
   KOCHI-682 008.

BY ADV. SRI.N.SUBRAMANIAM
SRI.M.S.NARAYANAN

RESPONDENTS: PETITIONERS/DEFENDANTS

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1. M/S.ST.LOUIS SCHOOL KURI FUND,
   P.O.MUNDANVELLI, KOCHI-682 507,
   REP. BY ITS EX-OFFICIO PRESIDENT VIKAR OF
   ST.LOUIS CHURCH, MUNDANVELI P.O., KOCHI-682 507.

2. MR.K.A.FRANCIS, AGED ABOUT 82 YEARS,
   S/O.AUGUSTINE KATTIPARAMBIL HOUSE,
   MUNDANVELI P.O., KOCHI-682 507.

3. MR.JOSE IGNACIOUS,
   AGED ABOUT 45 YEARS, S/O.JACOB,
   ADVOCATE, KADAVIPARAMBIL HOUSE, MANASSERRY,
   MUNDANVELI P.O., KOCHI-682 507.

4. MR.GEORGE JAMES, AGED ABOUT 50 YEARS,
S/O.JAMES, ADVOCATE, VATTATHARA, MUNDANVELI P.O.,
KOCHI-682 507.

5. MR.BABU VARGHESE, AGED ABOUT 45 YEARS,
S/O.JOSEPH, KADAVIPARAMBIL HOUSE,
MUNDANVELI P.O., KOCHI-682 507.

BY ADV. SRI.JOSE JOSEPH ARAYAKUNNEL

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 18/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

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F.A.O. No.293 of 2006

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Dated this the 18th day of October, 2007.

JUDGMENT

This appeal is filed against the order passed by the court below in I.A. No.1375/2006 in I.A. No.1244/2006 in O.S. No.116/2006. The short facts necessary for the disposal of this appeal are as follows. The appellants filed I.A. 1244/2006 on 21.8.2006 under Section 92 read with Section 151 of CPC seeking leave to file a suit under Section 92 of the CPC. The petition was posted to 22.8.2006. On that day the learned Subordinate Judge heard arguments and posted that petition for orders to 25.8.2006. On that day the court below granted the leave sought for. On that day itself the appellants filed the plaint under Section 26 read with Order VII Rule 1 Section 92 and Order I Rule 8 of Code of Civil Procedure. The same was numbered as O.S. 116/2006. The learned Subordinate Judge issued summons to the defendants. They entered appearance. Third defendant had already filed written statement also. Along with the plaint, the appellants filed I.A. 1283/2006 under Order 39 Rule 1 and 2 for an order of temporary injunction. In that application the Subordinate Judge issued notice. On 29.8.2006 respondents 1 to 4 entered appearance and filed

counter to that application. Subsequently that application was dismissed by a separate order. The respondents filed I.A. 1375/2006 on 16.9.2006 under Section 114 read with Section 151 of the CPC to review the order passed in I.A. 1244/2006. On 3.10.2006, the appellant filed counter to the review petition. Arguments were heard on that day and on 16.10.2006 the I.A. 1375/2006 was allowed and the order passed on 25.8.2006 in I.A. 1244/2006 was set aside. Challenging that order this F.A.O. is filed.

2. The learned counsel appearing for the appellants has argued that the order passed by the learned Subordinate Judge is faulty and liable to be interfered with. The learned counsel for the appellant relied on the following decisions, NARAYANA PILLAI V. JYOTHI (1991(2) KLT 458), G.KOSHY V. CHACKO THOMAS (AIR 1963 KERALA 191), HARENDRA NATH V. KALIRAM DAS (AIR 1972 SC 246), PARMATMAN AND SARASWATI V. R.TRIPATHI (AIR 1974 SC 2141), C.C.BABY V. STEWARD CO. LTD. (1990(2) KLJ 272), CHENNAI VAZHAL DURAIYUR NADAR URAVIN MURAI MAGAMAI SANGAM V. GURUSAMY (2004) 1 M.L.J. 731, THENAPPA CHETTIAR V. KARUPPAN CHETTIAR (AIR 1968 SC 915). He invited my attention to a number of other decisions also and argued that the grounds stated by the trial court to set aside the leave granted are illegal. It is

argued that in a petition to review an earlier order the only ground arising for consideration is whether the petitioner has established any one of the grounds mentioned in Order XLVII Rule 1 of the Code of Civil Procedure. Learned counsel appearing for the respondents has argued that there is absolutely no averments to attract the provisions of Section 92 and a reading of the plaint itself will show that the case is false or vexatious and in such cases the court has a duty to reject the plaint. He relied on the decision in T.ARIVANDANDAM V. T.V.SATYAPAL (AIR 1977 SC 2421). It is also argued that even accepting the entire case pleaded by the plaintiffs in the plaint that there was a trust, that trust had served its purpose and extinguished. It is argued that in such cases no suit under Section 92 is maintainable. In support of that argument he relied on decision in AMRIT LAL KOHLI V. HARBANS LAL KOHLI (AIR 2001 DELHI 24).

3. The plaintiffs filed I.A. 1244/2006 alone on 21.8.2006 seeking leave to institute a suit under Section 92 of the C.P.C. The court passed an exparte order granting the leave sought for. It is trite law that when leave is granted, the suit can be numbered. It is also trite law that if the leave is granted exparte, the defendant has got a right to appear and seek revocation of the order granting leave. In this case leave was granted on 25.8.2006 in I.A. No.1244/2006 and on 25.8.2006 itself the plaint was presented. It was

numbered and summons were issued. The defendants entered appearance also. It is seen that the third defendant had already filed written statement. The defendants filed I.A. 1375/2006 under Section 114 of CPC with a specific prayer to review and set aside the order granting leave. When copy of that application was served on the plaintiffs, they have filed their objections. The prayer in I.A. 1375/2006 reads as follows:

> "For the reasons stated in the accompanying affidavit it is most humbly prayed that this Hon'ble Court be pleased to review and consequentially set aside the order dated 29.8.2006 in I.A. No.1244 of 2006 in O.S. No.116 of 2006 in the interest of justice."

So, in fact, the respondents sought review of the order dated 25.8.2006 passed in I.A. 1244/2006 granting leave. In I.A. 1375/2006 as well as in the order impugned the date of disposal is stated as 29.8.2006. It is not correct. The correct date is 25.8.2006. The court below had allowed that application, but thereafter the court below did not reconsider the leave application on its merits independently. No order subsequent to allowing the review petition was passed. When a petition for review under Section 114 is filed, the procedure is prescribed under Order XLVII; Order XLVII Rule 4 deals with the nature of the order to be passed in review application. Rule 6 deals with the procedure of an application where rejected. Rule 7 provides that order of rejection is not appealable, but an order granting

review is appealable. Order 43 Rule 1(w) provides that an order under Rule 4 of Order 47 granting an application for review is appealable. Rule 8 of Order XLVII prescribes the procedure when the application is allowed. Rule 8 is as follows:

> "Registry of application granted, and order for re-hearing:- When an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit."

In this case while dealing with I.A. 1375/2006 the court below should have only considered whether the respondents have made out a case for review of the order passed by it in I.A. 1244/2006. Since the leave was granted exparte without hearing the defendants, they have a right to ask for revocation of the order granting leave. So the court below out to have reheard I.A. 1244/2006 on the same day and passed an order either allowing or dismissing the same. I have perused I.A. 1244/2006. It does not contain any endorsement or order other than the one passed by the trial court on 25.8.2006. There must be two separate orders, one allowing or dismissing the review petition. If the review is allowed, the petition must be reheard. The procedure adopted by the learned Subordinate Judge in not rehearing I.A. 1244/2006 consequent to the order passed in I.A. 1375/2006 is illegal. So the proper course open to me is to dispose of this F.A.O. treating the

same as one filed against an order allowing the review application. The order passed by the court below allowing I.A. 1375/2006 is on the ground that leave was granted exparte. Further the learned Subordinate Judge had not given any reason for granting the leave sought for. So the order passed by the court below allowing review application is only to be confirmed. I do so. But the lower court shall rehear I.A. 1244/2006 and dispose of the same in accordance with law untrammeled by the observation contained in the order passed by it in I.A. 1375/2006 or in this order, as expeditiously as possible, at any rate, within one month from the date of receipt of copy of this judgment.

In the result, the F.A.O. is disposed of in the above terms.

K.PADMANABHAN NAIR
Judge

pms